

FILED  
SUPREME COURT  
STATE OF WASHINGTON  
5/11/2020 2:43 PM  
BY SUSAN L. CARLSON  
CLERK

No. 97652-0

SUPREME COURT  
OF THE STATE OF WASHINGTON

---

TODD MCLAUGHLIN, a Washington Resident

Appellant;

v.

TRAVELERS COMMERCIAL INSURANCE COMPANY,  
a foreign corporation

Respondent.

---

TRAVELERS COMMERCIAL INSURANCE COMPANY'S ANSWER  
TO AMICUS BRIEF OF WASHINGTON STATE ASSOCIATION  
FOR JUSTICE FOUNDATION

---

Thomas Lether, WSBA #18089  
Lether Law Group  
1848 Westlake Ave N., Suite 100  
Seattle, WA 98109  
Telephone: (206) 467-5444  
Facsimile: (206) 467-5544  
tlether@letherlaw.com  
*Attorney for Respondent Travelers  
Commercial Insurance Company*

**TABLE OF CONTENTS**

Table of Authorities .....ii

I. Introduction ..... 1

II. Statement of the Case.....3

III. Argument .....4

    A. PIP Coverage and MedPay are Two Distinct Coverages and  
    Should Be Treated Accordingly .....4

    B. There is No Choice of Law Conflict Between Washington and  
    California Regarding Policy Interpretation of Undefined Policy  
    Terms .....8

V. Conclusion .....12

## TABLE OF AUTHORITIES

### CASES

#### *Washington Cases*

<i>Boeing Co. v. Aetna Casualty &amp; Sur. Co.</i> , 113 Wn.2d 869, 877, 784 P.2d 507, 511 (1990) .....	8
<i>Burnside v. Simpson Paper Co.</i> , 123 Wn.2d 93, 103, 864 P.2d 937, 942 (1994) .....	8, 9
<i>Durant v. State Farm Mut. Auto. Ins. Co.</i> , 191 Wn.2d 1, 419 P.3d 400 (2018).....	10
<i>McLaughlin v. Travelers Commercial Ins. Co.</i> , 9 Wn. App. 2d 675, 679, 446 P.3d 654, 656, (2019) .....	8
<i>Overton v. Consol. Ins. Co.</i> , 145 Wn.2d 417, 428, 38 P.3d 322, 327 (2002).....	10
<i>Prudential Property &amp; Casualty Ins. Co. v. Lawrence</i> , 45 Wn. App. 111, 118, 724 P.2d 418, 422 (1986) .....	10
<i>Robbins v. Mason Title Ins. Co.</i> , ___ Wn.2d ___, Case No. 96726-1, slip op, (May 7, 2020).....	11
<i>Seizer v. Sessions</i> , 132 Wn.2d 642, 648, 940 P.2d 261, 264 (1997) .....	9
<i>Stamp v. Dep't of Labor &amp; Indus.</i> , 122 Wn.2d 536, 540, 859 P.2d 597, 599 (1993) .....	8
<i>State Farm Gen. Ins. Co. v. Emerson</i> , 102 Wn.2d 477, 485 687 P.2d 1139 (1984) .....	9
<i>Transcon. Ins. Co. v. Wash. Pub. Utils. Districts' Util. Sys.</i> , 111 Wn.2d 452, 456-457, 760 P.2d 337, 340 (1988) .....	9
<i>Woodward v. Taylor</i> , 184 Wn.2d 911, 915, 366 P.3d 432, 434 (2016) .....	9

#### *Other Jurisdictions*

<i>21st Century Ins. Co. v. Superior Court</i> , 47 Cal 4th 511, 516 (2009) .....	5
<i>AIU Ins. Co. v. Superior Court</i> , 51 Cal. 3d 807, 825, 799 P.2d 1253, 1267, 274 Cal. Rptr. 820, 834 (1990) .....	11
<i>Atlantic Mutual Ins. Co. v. Ruiz</i> , 123 Cal. App. 4th 1197, 1203, 20 Cal. Rptr. 3d 628, 632 (2004) .....	8, 11

<i>Employers Reinsurance Co. v. Superior Court</i> , 161 Cal. App. 4th 906, 919-920, 74 Cal. Rptr. 3d 733, 744 (2008).....	10
<i>Hervey v. Mercury Cas. Co.</i> , 185 Cal App 4th 954 (2010) .....	5
<i>Nager v. Allstate Ins. Co.</i> , 83 Cal.App.4th 284, 289–290 (2000) .....	5

**STATUTES**

***Washington Statute***

RCW 48.22.005 .....	6
RCW 48.22.058(1) .....	2
RCW 48.22.085.....	6
RCW 48.22.095(1)(a) .....	6

***Other Jurisdictions***

Cal Ins. Code §§ 1-16032 .....	5
--------------------------------	---

**OTHER AUTHORITIES**

<i>Restatement (Second) of Conflict of Laws</i> (Am. Law Inst. 1971) .....	8
--	---

## I. INTRODUCTION

Washington State Association for Justice Foundation's (hereinafter "WSAJ") Brief of Amicus Curiae should be rejected. WSAJ attempts to raise a new theory and argument that has not previously been addressed by any party. Moreover, WSAJ asks this Court to depart from this its long-standing jurisprudence regarding policy interpretation.

WSAJ submits the argument that if coverage is not extended to McLaughlin, the Traveler's policy would fail to comply with the statutorily required minimum coverage for Personal Injury Protection (hereinafter "PIP"). This is the first time this theory has been advanced and is a theory that has not been offered by any party prior to WSAJ's brief. This is improper.

Moreover, both WSAJ and McLaughlin have failed to establish any legal support for their argument that Washington statutes should apply to a policy issued in California. This is especially true with respect to WSAJ, which argues that Washington's PIP scheme should be applied even though McLaughlin's insurance policy did not contain PIP coverage. Rather, it provided Medical Payments coverage (hereinafter "MedPay"). This coverage is different than PIP coverage and conforms to California rules regarding insurance coverage. WSAJ presents no legal support as to

why this Court must treat McLaughlin's policy as a PIP policy, when in fact it is not.

Furthermore, under Washington law, PIP coverage is not mandatory. Rather, the Washington PIP statutes only require that an insurer offer certain minimal coverage for insureds. RCW 48.22.058(1) ("No new automobile liability insurance policy or renewal of such an existing policy may be issued unless personal injury protection coverage is offered as an optional coverage.")

Similarly, WSAJ argues McLaughlin's MedPay policy and PIP coverage are identical in nature and thus the PIP statutory definitions control. This is also incorrect. Although MedPay and PIP have overlapping coverages, they are distinct and should be treated accordingly.

Finally, WSAJ urges this Court to ignore the firmly established and unambiguous rulings of this Court regarding the interpretation of insurance policies. This Court has long held that undefined terms in a policy are given their plain and ordinary meaning as set forth in common dictionary definitions. Division I correctly applied that well-settled law in this case. WSAJ provides no cognizable basis for overturning this longstanding principle of Washington insurance law.

//

//

## II. STATEMENT OF THE CASE

The facts that give rise to the present action have been extensively briefed by the parties. For this reason and in the interest of economy, Travelers will not fully reiterate the same, aside from setting forth the controlling terms of the MedPay coverage as set forth in the Travelers insurance policy at issue below:

### MEDICAL PAYMENTS COVERAGE SECTION Coverage C- Medical Payments

...

#### Insuring Agreement

- A. We will pay the usual and customary charge for reasonable expenses incurred for necessary medical and funeral services because of “bodily injury”:
1. Caused by an accident; and
  2. Sustained by an “insured”.

...

- B. “Insured” as used in this Coverage Section means:
1. You or any “resident relative”:
    - a. While “occupying”; or
    - b. As a pedestrian when struck by;  
a motor vehicle designed for use mainly  
on public roads or a trailer of any type.

CP 39.

The policy issued to McLaughlin, policy no. 9953997242031, by Travelers is an automobile policy listing McLaughlin as a named insured (the “Subject Policy”). The policy lists the limits of the policy as follows:

...

**Medical Payments**

\$5,000 each person

**Uninsured Motorist Bodily Injury**

\$100,000 each person

\$300,000 each accident

...

CP 17-18.

To the extent that the Court requires a detailed recitation of facts, Travelers directs this Court to Travelers' Answer to McLaughlin's Petition for Review.

**III. ARGUMENT**

**A. PIP Coverage and MedPay are Two Distinct Coverages and Should Be Treated Accordingly**

WSAJ asks the Court to replace McLaughlin's MedPay coverage with PIP coverage. This argument is without factual or legal support. WSAJ would have this Court reform the Subject Policy in order to replace McLaughlin's MedPay coverage with coverage conforming to the Washington minimum PIP coverages that must be offered to purchase insurance. However, WSAJ's argument is without merit because, although MedPay and PIP coverages have some similarities, MedPay and PIP coverage are distinct.

Med-Pay coverage is no-fault coverage for “reasonable and necessary medical expenses incurred due to an accident up to a relatively low dollar limit.” *21st Century Ins. Co. v. Superior Court*, 47 Cal 4th 511, 516 (2009). In California, MedPay coverage is purely a matter of contract. “There is no statutory obligation to provide med-pay coverage.” *Id.* (citing *Nager v. Allstate Ins. Co.*, 83 Cal.App.4th 284, 289–290 (2000)). Likewise, insurers contracting in California are not required to offer MedPay coverage when negotiating their insurance contracts. Of the twenty (20) times that “medical payment(s)” is mentioned in the California Insurance Code, not once does the Code mention that it is a statutory requirement for insurers to offer MedPay prior to contracting. *See generally* Cal Ins Code §§ 1-16032.

Thus, the basic principles of policy interpretation, which call for applying the plain and ordinary meaning of unambiguous policy terms, apply to interpreting the scope of MedPay coverage in California. *See Hervey v. Mercury Cas. Co.*, 185 Cal App 4th 954 (2010) (applying common law policy interpretation principles to determine interplay between MedPay coverage and underinsured motorist coverage based on terms in a California auto policy).

In contrast, Washington statutorily requires auto insurers issuing policies in Washington to offer PIP coverage subject to certain

requirements. RCW 48.22.005; RCW 48.22.085 *et seq.* These requirements do not apply to the policy issued to McLaughlin, because the policy was not offered in Washington. The policy was issued to McLaughlin at his address in California. Moreover, there is no legal authority for WSAJ's position that McLaughlin's MedPay policy somehow converts to a PIP policy because he was in Washington at the time of the accident.

The difference in the policies is further established by the available limit under MedPay and the statutory PIP minimum that must be offered. McLaughlin's policy had a \$5,000 MedPay limit. CP 17. The Washington Statutes require that a minimum of \$10,000 in PIP be offered. RCW 48.22.095(1)(a). WSAJ does not address this difference, or which limit would apply under its argument. If WSAJ believes the policy should be reformed completely, including the limit, this would render the policy McLaughlin actually purchased futile. His premium, at least in part, was calculated based upon the limit of the MedPay coverage and the insurance policy was drafted to comply with California law. Without providing this Court with evidentiary support for the reformation of the contract, WSAJ is asking this Court to ignore the differences between MedPay and PIP. This would be improper.

WSAJ further argues that this Court must assume McLaughlin would have accepted PIP coverage had it been offered. There is no legal support for this assertion. There is also no evidence that McLaughlin would have accepted PIP coverage if offered. As set forth above, an offer of PIP coverage is required under Washington law. McLaughlin purchased his policy in California, not Washington. WSAJ's assertion that the Court must assume McLaughlin would have accepted is meritless, even in the absence of any evidence, because Travelers had no obligation to offer him PIP at the time he purchased the policy.

Even if the answer was in the affirmative, WSAJ is asking the court to replace the coverage offered in the McLaughlin policy, an argument that was not raised by McLaughlin. Rather, McLaughlin's position at trial court and Court of Appeals was that the term "pedestrian" in the Travelers policy should be defined per the RCW definition of pedestrian. WSAJ's arguments ask this Court to look past the evidentiary support and, instead, to introduce assumptions that have no basis in evidence. This unacceptable argument is without merit. WSAJ's arguments should be rejected.

///

///

**B. There is No Choice of Law Conflict Between Washington and California Regarding Policy Interpretation of Undefined Policy Terms**

There is no conflict of law in this matter because the sole issue in this case is how to interpret undefined terms in the policy, and Washington and California interpret undefined terms in policies in generally the same way. *Compare Boeing Co. v. Aetna Casualty & Sur. Co.*, 113 Wn.2d 869, 877, 784 P.2d 507, 511 (1990) (“Undefined terms in an insurance contract must be given their ‘plain, ordinary and popular’ meaning.”) *with Atlantic Mutual Ins. Co. v. Ruiz*, 123 Cal. App. 4th 1197, 1203, 20 Cal. Rptr. 3d 628, 632 (2004) (“When interpreting a policy provision, we must give its terms their ‘ordinary and popular sense,’ unless ‘used by the parties in a technical sense or a special meaning is given to them by usage.’”). Division I engaged in this exact analysis when it came to the correct result (“The term “pedestrian” is not defined in the policy. Therefore, we look to the dictionary definition of the term “pedestrian” to determine its plain, ordinary, and popular meaning.”) *McLaughlin v. Travelers Commercial Ins. Co.*, 9 Wn. App. 2d 675, 679, 446 P.3d 654, 656 (2019).

For the Court to engage in a conflict of law analysis there must be an actual conflict between the law of Washington and that of another state. *Stamp v. Dep't of Labor & Indus.*, 122 Wn.2d 536, 540, 859 P.2d 597, 599 (1993). *See also Burnside v. Simpson Paper Co.*, 123 Wn.2d 93, 103, 864

P.2d 937, 942 (1994). If there is an actual conflict, this Court decides the applicable law “under the framework established in the *Restatement (Second) of Conflict of Laws* (Am. Law Inst. 1971).” *Woodward v. Taylor*, 184 Wn.2d 911, 915, 366 P.3d 432, 434 (2016). To do so, the “court applies the two-part most significant relationship test to determine which state's substantive law to apply to the claim”. *Id.* at 918, 366 P. 3d at 435. However, “an actual conflict between the law of Washington and the law of another state *must be shown* to exist before Washington courts will engage in a conflict of law analysis.” *Burnside v. Simpson Paper Co.*, 123 Wn.2d 93, 103, 864 P.2d 937, 942, (1994) (italics added). An actual conflict of law exists where the result of an issue is different under the laws of the interested states. *Woodward v. Taylor*, 184 Wn.2d at 918, 366 P.3d at 435. *See also Seizer v. Sessions*, 132 Wn.2d 642, 648, 940 P.2d 261, 264 (1997) (“When the result of the issues is different under the law of the two states, there is a ‘real’ conflict.”)

Here, not only do Washington and California analyze undefined terms in the same way, but they also use the same method of policy interpretation. *Compare Transcon. Ins. Co. v. Wash. Pub. Utils. Districts' Util. Sys.*, 111 Wn.2d 452, 456-457, 760 P.2d 337, 340 (1988) (“The interpretation of insurance policies is a question of law. In construing the language of an insurance policy, the entire contract must be construed

together so as to give force and effect to each clause. If the language in an insurance contract is clear and unambiguous, the court must enforce it as written and may not modify the contract or create ambiguity where none exists.”) (internal citations omitted) *with Employers Reinsurance Co. v. Superior Court*, 161 Cal. App. 4th 906, 919-920, 74 Cal. Rptr. 3d 733, 744 (2008) (“Although insurance contracts have special features, they are still contracts to which the ordinary rules of contractual interpretation apply.”)

Furthermore, Washington and California use the same analysis to address the definition of an undefined term. As far back as 1986, this Court has consistently held, that when interpreting an undefined term in a policy, the Court must look at the term’s plain meaning per the term’s standard dictionary definition. *Prudential Property & Casualty Ins. Co. v. Lawrence*, 45 Wn. App. 111, 118, 724 P.2d 418, 422 (1986) (“Undefined terms in an insurance contract must be given their popular and ordinary meaning”); *Overton v. Consol. Ins. Co.*, 145 Wn.2d 417, 428, 38 P.3d 322, 327 (2002) (“Undefined terms in an insurance contract are given ‘plain, ordinary, and popular meaning’ as set forth in standard English language dictionaries.”); *Durant v. State Farm Mut. Auto. Ins. Co.*, 191 Wn.2d 1, 12, 419 P.3d 400, 405, (2018). (“undefined terms in insurance contracts ‘must’ be given their plain, ordinary, and popular meaning, and courts may look to standard English language dictionaries to determine common

meaning”); *See also Robbins v. Mason Title Ins. Co.*, \_\_\_ Wn.2d \_\_\_, Case No. 96726-1, slip op at 9, (May 7, 2020) (this Court looked to Webster’s Third New International Dictionary and Black’s Law Dictionary to determine the “plain and ordinary meaning” of the undefined term “demand” under the insurance policy at issue.).

California follows the same analysis. *See AIU Ins. Co. v. Superior Court*, 51 Cal. 3d 807, 825, 799 P.2d 1253, 1267, 274 Cal. Rptr. 820, 834 (1990) (because the policy did not define the term “damages”, the California Supreme Court turned to the dictionary definitions for guidance regarding the terms “ordinary and popular” definition); *see also Atlantic Mutual Ins. Co. v. Ruiz*, 123 Cal. App. 4th 1197, 1203, 20 Cal. Rptr. 3d 628, 632 (2004) (“When interpreting a policy provision, we must give its terms their ‘ordinary and popular sense,’ unless ‘used by the parties in a technical sense or a special meaning is given to them by usage.’). As shown above, both California and Washington interpret policies as contracts by analyzing the policy as a whole and by enforcing the contract as written. Thus, there is no conflict of law regarding policy interpretation.

WSAJ argues without legal support that Washington law applies and attempts to avoid a choice of law issue by asserting that Travelers waived any choice of law issues with regard to the application of the

Washington PIP statute to a California policy. This position is unsupported.

At no time has Travelers agreed that the application of Washington statutory law to a California insurance policy fails to raise a conflict of law issue. By its very nature, WSAJ's argument raises a conflict. Additionally, WSAJ fails to address why a California policy, drafted in accordance with California law, is reformed when the insured enters Washington state. WSAJ provides no legal authority on this issue. It only argues that Travelers has somehow agreed there is no conflict. WSAJ's position lacks both evidentiary and legal support for its position, and its Amicus Brief and the arguments therein should be rejected.

#### IV. CONCLUSION

Based on the foregoing Travelers respectfully asks that this Court discard WSAJ's brief entirely.

DATED this 11th day of May, 2020.

LEATHER LAW GROUP

*s/Thomas Lether*  
Thomas Lether, WSBA #18089  
1848 Westlake Ave N., Suite 100  
Seattle, WA 98109  
Telephone: (206) 467-5444  
Facsimile: (206) 467-5544  
[tlether@letherlaw.com](mailto:tlether@letherlaw.com)  
*Attorney for Respondent Travelers  
Commercial Insurance Company*

## CERTIFICATE OF SERVICE

The undersigned hereby certifies under the penalty of perjury under the laws of the State of Washington that on this date I caused to be served in the manner noted below a true and correct copy of the foregoing on the party mentioned below as indicated:

<p><i>Counsel for Appellant Todd McLaughlin</i>                  Robert Levin                  Anderton Law Office - Washington Bike Law                  705 Second Avenue, Suite 1000                  Seattle, WA 98104                  rob@washingtonbikelaw.com</p>	<p><input type="checkbox"/> U.S. Mail  <input type="checkbox"/> Hand Delivery  <input type="checkbox"/> Facsimile  <input type="checkbox"/> Overnight  <input checked="" type="checkbox"/> E-mail</p>
<p><i>Counsel for Appellant Todd McLaughlin</i>                  Aaron P. Orheim                  Philip A. Talmadge                  Talmadge/Fitzpatrick/Tribe                  2775 Harbor Avenue SW                  Third Floor, Suite C                  Seattle, WA 98126                  aaron@tal-fitzlaw.com                  phil@tal-fitzlaw.com</p>	<p><input type="checkbox"/> U.S. Mail  <input type="checkbox"/> Hand Delivery  <input type="checkbox"/> Facsimile  <input type="checkbox"/> Overnight  <input checked="" type="checkbox"/> E-mail</p>
<p><i>Counsel for Amicus Curiae Cascade Bicycle Club</i>                  Stephanie Taplin                  Newbry Law Office                  623 Dwight Street                  Port Orchard, WA 98366                  stephanie@newbrylaw.com</p>	<p><input type="checkbox"/> U.S. Mail  <input type="checkbox"/> Hand Delivery  <input type="checkbox"/> Facsimile  <input type="checkbox"/> Overnight  <input checked="" type="checkbox"/> E-mail</p>

<p><i>Counsel for Amicus Curiae Washington State Association for Justice Foundation</i></p> <p>Daniel E. Huntington  422 W. Riverside  Suite 1300  Spokane, WA 99201  danhuntington@richter-wimberley.com</p> <p>Valerie D. McOmie  4549 NW Aspen Street  Camas, WA 98607  valeriemcomie@gmail.com</p>	<input type="checkbox"/> U.S. Mail <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Facsimile <input type="checkbox"/> Overnight <input checked="" type="checkbox"/> E-mail
<p><i>Counsel for Amicus Curiae United Policyholders</i></p> <p>Ian S. Birk  Gabriel E. Verdugo  Keller Rohrback L.L.P.  1201 Third Avenue, Suite 3200  Seattle, WA 98101  ibirk@kellerrohrback.com  gverdugo@kellerrohrback.com</p>	<input type="checkbox"/> U.S. Mail <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Facsimile <input type="checkbox"/> Overnight <input checked="" type="checkbox"/> E-mail

DATED this 11th day of May, 2020.

s/ Tami Grende  
Tami Grende, Legal Assistant

**LEATHER AND ASSOCIATES, PLLC**

**May 11, 2020 - 2:43 PM**

**Transmittal Information**

**Filed with Court:** Supreme Court  
**Appellate Court Case Number:** 97652-0  
**Appellate Court Case Title:** Todd McLaughlin v. Travelers Commercial Insurance Company

**The following documents have been uploaded:**

- 976520\_Answer\_Reply\_20200511144037SC791741\_7689.pdf  
This File Contains:  
Answer/Reply - Other  
*The Original File Name was 200511 Answer to WSAJ's Amicus Brief.pdf*

**A copy of the uploaded files will be sent to:**

- Aaron@tal-fitzlaw.com
- aarceneaux@letherlaw.com
- cpilat@letherlaw.com
- danhuntington@richter-wimberley.com
- ekruh@letherlaw.com
- eneal@letherlaw.com
- gverdugo@kellerrohrback.com
- ibirk@kellerrohrback.com
- matt@tal-fitzlaw.com
- phil@tal-fitzlaw.com
- rob@washingtonbikelaw.com
- scolito@letherlaw.com
- stephanie@newbrylaw.com
- tgrende@letherlaw.com
- valeriemcomie@gmail.com

**Comments:**

TRAVELERS COMMERCIAL INSURANCE COMPANY ♦S ANSWER TO AMICUS BRIEF OF WASHINGTON STATE ASSOCIATION FOR JUSTICE FOUNDATION

---

Sender Name: Lindsay Hartt - Email: lhartt@letherlaw.com

**Filing on Behalf of:** Thomas Lether - Email: tlether@letherlaw.com (Alternate Email: lhartt@letherlaw.com)

Address:  
1848 Westlake Ave. N.  
Suite 100  
SEATTLE, WA, 98109  
Phone: (206) 467-5444 EXT 126

**Note: The Filing Id is 20200511144037SC791741**